IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12188 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PAMAN @ PAVAN NANDLAL SAIJWANI(SINDHI)

Versus

COMMISSIONER OF POLICE

Appearance:
MS BANNA DATTA for MR ANIL S DAVE for Petitioner
MR RC KODEKAR, Ld AGP for Respondent

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 10/05/2001

ORAL JUDGEMENT

1. Heard learned advocate Ms.Banna Dutta for the petitioner and learned AGP Mr.R. C. Kodekar for the respondent - State.

2. In the present petition under Article 226 of the Constitution of India, the petitioner has challenged the order of detention dated 10th November, 2000 passed by the Police Commissioner, Ahmedabad City, while exercising the powers under Section 3(1) of the Prevention of Anti Social Activities Act ('PASA Act' for short). The petitioner has been detained at Vadodara District Jail as Class-II detenu. The grounds of detention have been

communicated and supplied to the petitioner on 10th November, 2000 wherein in all, six offences have been registered against the present petitioner, and all the offences are relating to the Prohibition Act.The last offence registered against the present petitioner is on 3rd September, 2000. According to the grounds of detention, the petitioner was released on bail in pursuance to the offence at Sr.No.3 and in respect to the offence at Sr.Nos.2, 4, 5 and 6, the petitioner was in judicial custody and in respect to the offence at Sr.No.1 the petitioner was in police custody when the detention order was passed by the detaining authority. The statements of witnesses whose identity has not been disclosed has been recorded by Police Sub-Inspector, P.C.B. at Ahmedabad City on 6th November, 2000 and the same has been verified by the detaining authority on 9th November, 2000. The second statement has been recorded by the same Inspector on 7th November, 2000 and second statement has been verified by the detaining authority on 9th November, 2000. Thereafter, on the very next day, i.e. on 10th November, 2000 the order of detention has been passed by the detaining authority. The affidavit-in-reply has been filed by the respondent State which has been taken on record.

3. Learned advocate Ms.Banna Dutta for the petitioner has submitted that the two grounds are enough for vitiating the order of detention, though in petition various contentions have been raised by the petitioner. According to the learned advocate Ms.Banna Dutta that at the time of passing the detention order, the petitioner was in judicial custody and, therefore, the detention order is without considering the cogent material on record whether there is likelihood of the petitioner to be released from judicial custody, the order of detention has been passed which amounts to non-application of mind. The second contention which has been raised that the concerned police inspector has recorded two statements of witnesses whose identity has not been disclosed on 6th November, 2000 and 7th November, 2000 and both the statements were verified by the detaining authority on 9th November, 2000. Thereafter immediately on the next day i.e. on 10th November 2000 the detaining authority has passed the detention order which amounts to exercise the power in mechanical manner and, therefore, the detention order is required to be set aside. She has relied upon the decision of this Court in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v/s. State of Gujarat and others, reported in 2000 (3) GLR 2696.

4. Learned AGP Mr.R. C. Kodekar for the respondent

State has submitted that the respondent detaining authority has filed detailed reply and explained of all circumstances and also considering the fact that the activity which has been carried out by the petitioner in disturbing the public order and peace and which amounts to anti social activities is required to be restrained by way of detention order, otherwise it will be adversely effecting the public order and peace. Mr.Kodekar has also submitted that the detaining authority has applied his mind and considering the genuineness of the statements, privilege under section 9(2) of PASA Act has been claimed and there is no illegality in the detention order passed by the detaining authority.

5. I have heard learned advocates appearing on behalf of respective parties. In respect to the first contention which has been raised by the learned advocate on behalf of the petitioner that at the time of passing the detention order, the petitioner was in judicial custody and at that time it is a duty of the detaining authority to consider the cogent material on record which justified the detention order as per the the view taken by the Apex Court in the case of Ramesh Yadav v/s. District Magistrate, Etah and other, reported in 1985 SCC (Criminal) 514. The Apex Court has observed that merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail, an order of detention under the National Security Act should not ordinarily be passed. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Recently, the Apex Court has considered the very identical situation in the case of Amritlal and others v/s. Union Government, Through Secretary, Ministry of Finance and others, reported in (2001) 1 S.C.C. 341. The Apex Court has observed that the order is required to be passed by the detaining authority after having subjective satisfaction. When the detenu is already in jail, then the detaining authority must be satisfied on the basis of available cogent material about the likelihood of his moving application for bail. In absence of such satisfaction, the detention order cannot be sustained.

6. In light of the aforesaid observations made by the Apex Court, while considering ground of detention before the detaining authority, there was no cogent material before the detaining authority which has been discussed to the effect that there is likelihood of the petitioner to be released on bail. No circumstances have

been pointed out by the detaining authority which justified the subjective satisfaction of detaining authority. Therefore, on this ground, the detention order is required to be quashed and set aside.

7. In respect to the second contention that when the detaining authority has verified the statements and immediately on the very next day, if the detention order has been passed, then the view taken by this Court in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v/s. State of Gujarat and others, reported in 2000 (3) GLR 2696, that such exercise by the detaining authority has been considered as a mechanical one devoid of application of mind and result thereto, the order of detention has been quashed and set aside. Therefore, the following observations are important to be considered which are as under.

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659 the Court observed:

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1999, 21st August 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to be have been made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August, 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafer on the following day, i.e. on 30th August, 1999 the detention order has been passed.

The manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec.9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct.

Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec.9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under Sec.9(2) and it is established that in such cases, the wrong exercise of power under Sec.9(2) adversely affects the detenu's right of making an effective representation guaranteed under Art.22(5) of the Constitution of India.

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec.9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e., on the next day to the date on which the materials were considered by the detaining authority.

8. In light of the aforesaid observation of the Apex Court as well as this Court, according to my opinion, the detention order is required to be set aside as the detention order has been passed by the detaining authority without application of mind and it amounts to exercise the power in mechanical manner and, therefore, the same is required to be quashed.

9. For the reasons recorded in the oral judgment, the present petition succeeds and the same is allowed. The order of detention dated 10th November, 2000 is vitiated and resulted to quash and set aside. The detenu Paman @ Pavan Nandlal Sajwani (Sindhi) who has been detained at present in Vadodara Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

(H. K. Rathod, J.)

(vrpanchal)*